

Prosecuting Civilian Contractors under the UCMJ

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As they headed to the Baghdad airport in July, two security guards working for the contract firm Triple Canopy say they were stunned when their supervisor declared that he intended that day to kill somebody. The supervisor then fired his M4 rifle into the windshield of a parked truck, the two guards claim in court documents. Later in the day the supervisor fired half a dozen handgun rounds into a passing taxi, possibly killing the driver, the two guards allege. No investigation followed and no disciplinary action was taken against the alleged shooter.¹

Sadly, this is just one of many allegations of serious criminal misconduct by civilian contractors in Iraq and Afghanistan. Due to jurisdictional limits, the military has been powerless to prosecute them. However, in the Fiscal Year 2007 Defense Authorization Act, Congress added five magic words that expand the jurisdiction of the Uniform Code of Military Justice (UCMJ) to include civilian contractors who serve with or accompany the forces into harm's way.² The onus is now on the Department of Defense (DoD) to implement guidance concerning the use of this potential new-found power and to define the way in which the military will carry out the intent of Congress.³ In order to prosecute civilian contractors successfully under the UCMJ, the DoD must clarify the application of its new-

¹ William Matthews, "Contractor Crackdown," *The Armed Forces Journal*, February 2007, <http://www.armedforcesjournal.com/2007/02/2471808> (13 December 2007).

² Griff Witte, "New Law Could Subject Civilians to Military Trial," *The Washington Post*, 15 January 2007, A1, <<http://www.washingtonpost.com/wp-dyn/content/article/2007/01/14/AR2007011400906.html>> (13 December 2007).

³ Amy Klamper, "Hold Them Accountable," *Sea Power*, July 2007, 14-19, *Multiple Databases*, ProQuest (14 December 2007).

found jurisdiction in terms of personal jurisdiction, subject matter jurisdiction, and contractual language.

Background

Civilian-Soldier

The role and presence of the civilian contractor has recently exploded. During the First Gulf War, an estimated 9,200 civilian contractors accompanied U.S. forces into the region (which amounted to approximately one-tenth of the force).⁴ Presently, over 120,000 civilian contractors currently work in Iraq.⁵ Furthermore, the role of certain civilian contractors is becoming increasingly military in nature.

Companies such as Blackwater USA, Triple Canopy, Aegis, and other private military firms (PMFs) specialize in providing combat-related services that were previously preformed by uniformed personnel. Tasks include openly carrying and operating weapons systems, interrogating prisoners, training Iraqi police and security forces, and operating surveillance equipment.⁶ With this unprecedented expansion in role and presence of contractors in combat zones comes an increased need for supervision and oversight. As Major General William L. Nash, United States

⁴ Klamper, 14-19.

⁵ Klamper, 14-19.

⁶ Lindemann, 84,85

Army (Retired) observes, "If you're trying to win hearts and minds and the contractor is driving 90 miles per hour through the streets and running over kids, that's not helping the image of the American army. The Iraqis aren't going to distinguish between a contractor and a soldier."⁷

Five Magic Words

Peter Singer, a senior fellow and director of the 21st Century Defense Initiative at the Brookings Institute, was the first to report the potential impact of a five-word change inserted by Congress into Article 2(a)(10) of the UCMJ:

Amidst all the add-ins, pork spending, and excitement of the budget process, it has now come out that a tiny clause was slipped into the Pentagon's fiscal year 2007 budget legislation. The one sentence section (number 552 of a total 3510 sections) states that "Paragraph (10) of section 802(a) of title 10, United States Code (article 2(a) of the Uniform Code of Military Justice), is amended by striking 'war' and inserting 'declared war or a contingency operation'." The measure passed without much notice or any debate. And then, as they might sing on *School House Rock*, that bill became a law ([P.L.109-364](http://www.gpo.gov/legislation/pub/law/109/364)). The addition of five little words to a massive US legal code that fills entire shelves at law libraries wouldn't normally matter for much. But with this change, contractors' 'get out of jail free' card may have been torn to shreds.⁸

⁷ Renae Merle, "Census Counts 100,000 Contractors in Iraq," *The Washington Post*, 5 December 2006, D1, <<http://www.washingtonpost.com/wp-dyn/content/article/2006/12/04/AR206120401311.html>> (15 December 2007).

⁸ Peter W. Singer, "The Law Catches Up to Private Militaries, Embeds," *Defense Tech*, 3 January 2007, <http://www.defensetech.org/archives/003123.html> (15 December 2007).

Senator Lindsey Graham, R-S.C., authored the five-word change in order to eliminate a legal gap that has allowed contractors to avoid prosecution when they break the law.⁹ Senator Graham said the change will "give military commanders a more fair and efficient means of discipline on the battlefield" by placing "civilian contractors accompanying the Armed Forces in the field under court-martial jurisdiction during contingency operations as well as in times of declared war."¹⁰

Previously, the principal way to prosecute civilian contractors during war or contingency operations was under the Military Extraterritorial Jurisdiction Act (MEJA) of 2000. MEJA extends federal criminal jurisdiction over crimes committed outside the United States by "persons employed by or accompanying the Armed Forces" who "engage in any conduct outside the United States that would constitute an offense punishable by imprisonment for more than one year if the offense had been engaged in within the maritime and territorial jurisdiction of the United States."¹¹ So far, however, MEJA has yet to produce any results largely because it requires federal prosecutors in

⁹William Matthews, "Some UCMJ rules now cover U.S. contractors," *Marine Corps Times*, 10 January 2007, <<http://www.marinecorpstimes.com/news/2007/01/dfn.ucmjcontractors070105/>>, (13 December 2007).

¹⁰ Matthews, *Armed Forces Journal*.

¹¹ Military Extraterritorial Jurisdiction Act (MEJA), 18 U.S.C., § 3261(a)(1)

the United States to gather evidence and depose witnesses located thousands of miles away in a war zone.¹² In a 2006 report to Congress, the Department of Justice admitted that it failed to act on twenty investigations of crimes allegedly committed by civilian contractors.¹³

The ineffectiveness of MEJA's application towards civilian contractors seems to be the catalyst for the insertion of the five magic words. However, the new language is silent as to how this newfound jurisdictional power can be implemented effectively; this chore was left to the Pentagon. In order to provide effective accountability for the actions of civilian contractors in accordance with congressional intent and constitutional guarantees, the DoD must set limits in terms of personal and subject matter jurisdiction and insert key language into all contracts.

"Persons subject to the chapter"¹⁴

The DoD must first determine which classes of civilians to subject to the military jurisdiction. The language in Article 2(10) following the five magic words states "persons serving with or accompanying an armed force

¹² Klamper, p. 15

¹³ Matthews, *Armed Forces Journal*.

¹⁴ Uniform Code of Military Justice (UCMJ), Article 2, 10 U.S.C. §802.

in the field.”¹⁵ It does not specify any particular group of people. Therefore, the DoD can choose from three separate levels of inclusiveness when deciding how wide to cast their jurisdictional net.¹⁶ The first level is to bring only civilians with DoD contracts under UCMJ jurisdiction. A wider cast would include all civilian contractors regardless of the source of their contract. Finally, the most expansive option is to include every civilian who accompanies the force during a declared war or contingency operation.¹⁷

The first option is to limit jurisdiction solely to DoD contractors. By virtue of their affiliation with the Department of Defense, this group is the most likely to be familiar with the UCMJ. However, limiting jurisdiction exclusively to DoD contractors seems to run contrary to Senator Graham’s intention when he inserted the five magic words.¹⁸ One of the main catalysts for expanding UCMJ jurisdiction was the Abu Ghraib scandal in which, despite numerous allegations of extremely serious crimes levied against civilian contractors, not one of them was prosecuted. “The American people need to understand,”

¹⁵ UCMJ Article 2.

¹⁶ Lindemann, 88

¹⁷ Lindemann, 83

¹⁸ Matthews, *Armed Forces Journal*.

Senator Graham says, "we're talking about rape and murder here. We're not just talking about giving people a humiliating experience, we're talking about rape and murder and some serious charges."¹⁹ However, the contractors singled out in the official Army report, an interrogator from Titan Corporation and an interpreter from CACI International, were contracted through the Department of the Interior and not the DoD.²⁰

The second option for the DoD is to extend jurisdiction to all civilian contractors who accompany the armed forces into harm's way. Bringing all civilian contractors, regardless of the source of their contract, under military jurisdiction could potentially lead to turf wars between the various governmental agencies.²¹ However, these other federal agencies have proven unable to regulate and discipline the conduct of their contractors adequately.²² Bringing all civilian contractors under the jurisdiction of the UCMJ seems to be more consistent with the intent of Congress. This option would be the Pentagon's best choice.

¹⁹ Matthews, *Marine Corps Times*.

²⁰ Lindemann, 87.

²¹ Lindemann, 89.

²² Lindemann, 89

The final option, all personnel accompanying the force, would not be the wisest choice. In addition to all civilian contractors, this group includes federal officials, embedded journalists, and representatives from non-governmental agencies (NGOs).²³ This option seems to be outside the scope intended by Congress and should not be put into effect.

Serious Offenses

The five magic words, in theory, make all offenses under the UCMJ applicable to civilian contractors who accompany the force during contingency operations. However, just as the DoD should limit personal jurisdiction to civilian contractors, they should also limit the offenses that will apply to contractors. Like MEJA, prosecution of civilian contractors under the UCMJ should be limited to offenses that would be felonies in civilian court.²⁴ Furthermore, civilians should never be prosecuted for offenses that are purely military²⁵ in nature.

As previously mentioned, the congressional intent behind the expansion of UCMJ jurisdiction was to eliminate the gaps that allowed civilian contractors who allegedly

²³ Witte.

²⁴ Klamper, 14-19.

²⁵ Purely military offenses are offenses that are unique to the military and have no real civilian equivalent. Examples include contempt toward officials, disrespect toward a superior commissioned officer, and fraternization.

committed serious crimes at Abu Ghraib, as well as other places in Iraq and Afghanistan, to avoid prosecution. Therefore, the DoD should limit the prosecution of civilian contractors to offenses that would be categorized as felony-type offenses such as rape, robbery, murder, and manslaughter. "The military doesn't want to get into the personal conduct side for the civilians," says Peter Singer. "But if a contractor shoots an Iraqi civilian or violates the rules of engagement, they do want something to happen, and the military is in the best position to adjudicate it because they are familiar with the context of a war zone."²⁶ The policing of the personal conduct of civilian contractors should be left to the contracting agency. The DoD can most effectively carry out the congressional intent by limiting its subject matter jurisdiction to felony-equivalent offenses.

New Contracts

After limiting personal jurisdiction to civilian contractors and limiting subject matter jurisdiction to felony-equivalent offenses, the final step is to change the contracts. All future contracts would include an acknowledgment by the contractor that he or she is subject to the UCMJ insomuch as it is applied to civilians while

²⁶ Klamper.

accompanying the force in a declared war or contingency operation. Furthermore, contracts would include a waiver of any constitutional rights afforded under the civilian court system, but not the military justice system.²⁷ The contractor would then be given specific training on the articles of the UCMJ by which he or she may be prosecuted and receive a brief on the rules of engagement (ROE) and the law of armed conflict (LOAC). The contract provision, coupled with the training piece, would eliminate the constitutional questions concerning the rights of civilian contractors in military courts such as the right to a grand jury hearing or a right to a trial by a jury of their peers.²⁸

Counterarguments

The opponents to the military having jurisdiction over civilian contractors generally focus on questions of constitutionality²⁹ or are concerned about unlimited military control over all civilians and all offenses under the UCMJ.³⁰ The constitutionality question becomes moot with waiver language placed into all contracts. Fears of

²⁷ Katherine Jackson, "Not Quite a Civilian, Not Quite a Soldier: How Five Words Could Subject Civilian Contractors In Iraq and Afghanistan to Military Jurisdiction," *Journal of the National Association of Administrative Law Judiciary*, Spring, 2007, p. 288. *LexisNexis Academic Universe* (14 December 2007).

²⁸ Jackson, p. 282

²⁹ Jackson, p. 282

³⁰ Matthews, *Marine Corps Times*.

embedded journalist being court-martialed for criticizing military officials³¹ are relieved by limiting personal jurisdiction to civilian contractors. Finally, concern over civilian contractors being prosecuted for fraternization or any other purely military offense³² is suppressed by limiting subject matter jurisdiction to serious, felony-level offenses such as rape and murder.

Conclusion

The serious crimes allegedly committed by civilian contractors in Iraq and Afghanistan, coupled with the ineffectiveness in the legal procedures that were in place to prosecute these crimes, led to Congress to take action. The military must use these five magic words in such a way as to both prevent further misconduct by contractors through UCMJ, ROE, and LOAC training and by exercising the power to prosecute offenses should they occur. The key to successful prosecution of civilian contractors is to limit the personal and subject matter jurisdiction to civilian contractors who commit serious crimes. Also, new contracts should be drafted by each contractor acknowledging that he or she is subject to the UCMJ while in a combat zone. By implementing these changes, the DoD will craft a system

³¹ Matthews, *Marine Corps Times*.

³² Witte

that is constitutionally sound and gives military commanders the tools they need to provide accountability for everyone that they bring to the battlefield.

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